

MAR 28 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PLASTIC POLLUTION COALITION, a
project of EARTH ISLAND INSTITUTE, a
non-profit organization,

Plaintiff,

v.

AMCOR RIGID PLASTICS USA, INC. and
AMCOR RIGID PLASTICS USA, LLC,

Defendants.

Case No. 2:15-CV-00614-WBS-KJN

[PROPOSED] CONSENT DECREE

(Federal Water Pollution Control Act, 33
U.S.C. §§ 1251, *et seq.*)

This **Consent Decree** ("Consent Decree" or "Agreement") is entered into by and between plaintiffs **Earth Island Institute** and **Plastic Pollution Coalition** (collectively, "PPC") and defendants **Amcors Rigid Plastics USA, Inc.** and **Amcors Rigid Plastics USA, LLC** (collectively, "Amcor"). PPC and Amcor are each a "Party" and collectively are referred to as the "Parties."

RECITALS

WHEREAS, Plastic Pollution Coalition, a project of the not-for-profit corporation Earth Island Institute, is a global alliance of individuals, organizations, and businesses working towards a world free of plastic pollution and its toxic impacts to humans, animals, and the environment, and Earth Island Institute further is dedicated generally to protecting and preserving the environment, including water quality.

WHEREAS, Amcor has a facility located at 2425 S. Watney Way, Fairfield, California 94533 (the "Facility"). Amcor manufactures plastic polyethylene terephthalate ("PET") bottles for the food and beverage industries. Compounds utilized in the manufacturing process include inks, solvents, hydraulic oils, heat transfer oils, and raw plastic materials. Outdoor operations include

1 loading docks, transformers, compressed gas storage, water treatment, and storage of PET in
2 silos. The company is classified under Standard Industrial Code (SIC) classification 3085
3 (Plastic Bottles).

4 WHEREAS, stormwater from the Facility drains into the public stormwater system
5 located on the Facility's periphery and is discharged to Suisan Slough, Suisun Bay, and then to
6 the San Francisco Bay.

7
8 WHEREAS, stormwater discharges associated with industrial activity at the Facility are
9 regulated pursuant to the National Pollutant Discharge Elimination System ("NPDES") General
10 Permit No. CAS000001 (State Water Resources Control Board ("State Board"), California
11 Regional Water Quality Order No. 2014-0057-DWQ ("2015 Permit") and shall in the future be
12 regulated pursuant to future iterations of this permit which are adopted by the State Board and
13 issued pursuant to Section 402 of the Federal Water Pollution Control Act, 33 U.S.C. §1342
14 (collectively hereinafter the "Stormwater Permit").

15 WHEREAS, on October 1, 2014, PPC sent Amcor a notice of intent to sue ("Notice") for
16 alleged violations of the Federal Water Pollution Control Act ("CWA") and alleged violations of
17 the Stormwater Permit for discharges at or about the Facility. *See Attachment 1.*

18 WHEREAS, on April 15, 2015, PPC filed the Complaint in this action against Amcor
19 asserting certain violations of the CWA, some of which PPC believes are continuing.

20 WHEREAS, Amcor denies any and all of PPC's claims in its Notice and Complaint.

21
22 WHEREAS, subsequent to receipt of PPC's Notice, Amcor took certain steps to change
23 its stormwater management at the Facility, including, most significantly, updating its Stormwater
24 Pollution Prevention Plan ("SWPPP") to add three new sampling locations to the one it was
25 previously sampling in order to evaluate Facility discharge locations that were not included
26 under the previous SWPPP.

27 WHEREAS, the Parties have agreed that settlement of this matter is in the best interest of
28 the Parties and that entry into this Consent Decree is the most appropriate means of resolving this
dispute. PPC and Amcor have entered into this Consent Decree without adjudication of PPC's

1 claims or admission by Amcor of any alleged violation or other wrongdoing, litigation, trial
2 adjudication, or admission of any issue of fact or law. PPC and Amcor have chosen to resolve in
3 full PPC's allegations in the Notice and Complaint through settlement and avoid the cost and
4 uncertainties of further litigation.

5 AGREEMENT

6 **NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency
7 of which is hereby acknowledged, the Parties each hereby agree as follows:
8

9 **I. COMPLIANCE-RELATED MEASURES**

10 1. Amcor will comply fully at all times with all conditions of the Stormwater Permit
11 and the CWA. Nothing in this Consent Decree shall be interpreted to require Amcor to violate or
12 reduce its obligations under the Stormwater Permit and the CWA.

13 2. For the next two rainy seasons occurring after the execution of this Agreement,
14 Amcor will capture samples of stormwater discharges from all discharge areas of the Facility, as
15 stated in its current SWPPP, unless there are substantial changes in its operation at the Facility,
16 or the Facility closes.

17 3. Amcor agrees to comply with the monitoring and reporting requirements of its
18 current SWPPP, or any future iteration of the SWPPP, whichever is more stringent.

19 **II. ENVIRONMENTAL MITIGATION FUNDS**

20 4. Within fifteen (15) calendar days after the Effective Date of this Consent Decree,
21 Amcor will deliver a payment in the amount of \$15,000 to the San Francisco Baykeeper, a not-
22 for-profit organization dedicated to the protection of the San Francisco Bay from pollution, to be
23 applied to projects that will benefit water quality in the San Francisco Bay watershed. Amcor
24 will mail a copy of the check to the party identified to PPC.

25 **III. EXPENSES AND COSTS**

26 5. Within fifteen (15) calendar days of the Effective Date of this Consent Decree,
27 Amcor will pay PPC the amount of \$10,000 to help defray PPC's reasonable expenses and costs,
28 including for: conducting an investigation of the Facility; legal research regarding Amcor's

1 alleged violations of the Stormwater Permit and the Water Quality Control Plan for the San
2 Francisco Bay Basin Plan's limitations; drafting, editing, and finalizing the notice of violation
3 and perfecting service on applicable Parties; and all other reasonable investigative and attorneys'
4 fees and costs incurred as a result of investigating the activities at Amcor's Facility, and
5 negotiating a resolution in the public interest. Such payment shall be made payable and sent to
6 the Greenfire Law Attorney Client Trust Account. Payment by Amcor shall constitute full
7 payment for all costs of litigation, including investigative, expert and attorneys' fees and costs,
8 and oversight costs incurred by PPC that have or could have been claimed in connection with
9 PPC's claims.
10

11 **IV. TERM OF AGREEMENT**

12 6. The term "Effective Date" as used in this Consent Decree shall mean the last day
13 for the United States Department of Justice and the United States Environmental Protection
14 Agency (collectively "Federal Agencies") to comment on the Consent Decree, i.e., the 45th day
15 following the Federal Agencies' receipt of the Consent Decree, or the date on which the Federal
16 Agencies provide notice that they require no further review and the Court enters the final
17 Consent Decree, whichever occurs earlier.
18

19 7. This Consent Decree shall take effect upon the Effective Date, and shall terminate
20 on July 31, 2018 (the "Termination Date").

21 **V. JURISDICTION OVER PARTIES**

22 8. For the purposes of this Consent Decree, the Parties stipulate that the United
23 States District Court for the Eastern District of California has jurisdiction over the Parties and
24 subject matter of this Consent Decree. The Parties stipulate that venue is appropriate in the
25 Eastern District of California and that Amcor will not raise in the future, as part of enforcement
26 of this Consent Decree, whether PPC has standing to bring the Complaint or any subsequent
27 action or motion against Amcor.
28

1 **VI. SUBMISSION OF CONSENT DECREE TO DOJ**

2 9. Within five (5) business days of receiving all of the Parties' signatures to this
3 Consent Decree, PPC shall lodge this Consent Decree with the Court and submit this Consent
4 Decree to the U.S. Department of Justice ("DOJ") and the U.S. Environmental Protection
5 Agency ("EPA") for agency review consistent with 40 C.F.R. § 135.5. The agency review period
6 expires forty-five (45) calendar days after receipt by the DOJ, evidenced by correspondence from
7 DOJ establishing the review period. In the event DOJ comments negatively on the provisions of
8 this Consent Decree, the Parties agree to meet and confer to attempt to resolve the issues raised
9 by DOJ.
10

11 **VII. DISMISSAL OF COMPLAINT WITH PREJUDICE**

12 10. Within five (5) business days of the Effective Date, the Parties shall file with the
13 Court a Stipulation to Dismiss with Prejudice and [Proposed] Order that shall provide that the
14 Complaint and all claims therein shall be dismissed with prejudice pursuant to Federal Rule of
15 Civil Procedure 41(a)(2), subject to the Court's continuing jurisdiction to enforce this Consent
16 Decree. Consistent with the Dispute Resolution provisions of this Consent Decree, the
17 Stipulation to Dismiss with Prejudice and [Proposed] Order shall state that the District Court will
18 maintain jurisdiction through July 31, 2018, or through the conclusion of any proceeding to
19 enforce this Consent Decree, for purposes of resolving any disputes between the Parties with
20 respect to any provision of this Consent Decree. If the District Court chooses not to enter the
21 Order, this Agreement shall be null and void.
22

23 **VIII. NO ADMISSION OR FINDING**

24 11. The Parties enter into this Consent Decree for the purpose of avoiding prolonged
25 and costly litigation. Neither this Consent Decree nor any payment pursuant to the Consent
26 Decree shall constitute evidence or be construed as a finding, adjudication, or acknowledgment
27 of any fact, law or liability, nor shall it be construed as an admission of any fact, finding, issue of
28 law, or violation of any law, rule or regulation, nor shall compliance with this Consent Decree
constitute or be construed as an admission by Amcor of any fact, finding, conclusion, issue of

1. law, or violation of law. However, this Consent Decree and/or any payment pursuant to the
2. Consent Decree may constitute evidence in actions seeking compliance with this Consent
3. Decree.

4. **VIV. MUTUAL RELEASE OF LIABILITY AND COVENANT NOT TO SUE**

5. 12. In consideration of the above, and except as otherwise provided by this Consent
6. Decree, the Parties hereby forever and fully release each other and their respective parents,
7. affiliates, subsidiaries, divisions, insurers, successors, assigns, and agents and all persons, firms,
8. and corporations having an interest in them, and current and former employees, attorneys,
9. officers, directors, and agents from any and all claims and demands of any kind, nature, or
10. description whatsoever, and from any and all liabilities, damages, injuries, actions or causes of
11. action, either at law or in equity, which the Parties have against each other arising from PPC's
12. allegations and claims as set forth in the Notice and Complaint for alleged Stormwater Permit
13. violations and alleged Clean Water Act violations at the Facility up to and including the date
14. upon which this Consent Decree is executed by the Parties.

15.
16. 13. The Parties acknowledge that they are familiar with section 1542 of the California
17. Civil Code, which provides:

18.
19. A general release does not extend to claims which the creditor does
20. not know or suspect to exist in his or her favor at the time of
21. executing the release, which if known by him or her must have
22. materially affected his or her settlement with the debtor.

23. 14. The Parties hereby waive and relinquish any rights or benefits they may have
24. under California Civil Code section 1542 with respect to any other claims against each other
25. arising from, or related to, the allegations and claims pertaining to the Facility as set forth in the
26. Notice and Complaint up to and including the date of execution of this Consent Decree.

27. 15. For the period beginning on the Effective Date and ending on July 31, 2018, PPC
28. agrees that neither PPC, its officers, executive staff, members of its governing board nor any
organization under the control of PPC, its officers, executive staff, or members of its governing
board, will file any lawsuit against Amcor seeking relief for alleged violations of the Clean

1 Water Act or violations of the Stormwater Permit at its facility located at 2425 S. Watney Way,
2 Fairfield, California 94533. PPC further agrees that, beginning on the Effective Date and ending
3 on July 31, 2018, PPC will not support other lawsuits, by providing financial assistance,
4 personnel time or other affirmative actions, against the Amcor facility located at 2425 S. Watney
5 Way in Fairfield that may be proposed by other groups or individuals who would rely upon the
6 citizen suit provision of the Clean Water Act to challenge the Facility's compliance with the
7 Clean Water Act or the Stormwater Permit.
8

9 **X. DISPUTE RESOLUTION PROCEDURES**

10 16. Except as specifically noted herein, any disputes with respect to any of the
11 provisions of this Consent Decree shall be resolved through the following procedure. The Parties
12 agree to first meet and confer to resolve any dispute arising under this Consent Decree. In the
13 event that such disputes cannot be resolved through this meet and confer process, the Parties
14 agree to request a settlement meeting before the Judge assigned to this action. In the event that
15 the Parties cannot resolve the dispute by the conclusion of the settlement meeting with the Judge,
16 the Parties agree to submit the dispute via motion to the District Court.

17 17. In resolving any dispute arising from this Consent Decree, the Court shall have
18 discretion to award attorneys' fees and costs to either party. The relevant provisions of the then-
19 applicable Clean Water Act and Rule 11 of the Federal Rules of Civil Procedure, or any other
20 legal authority, and applicable case law interpreting such provisions shall govern the allocation
21 of fees and costs in connection with the resolution of any disputes before the District Court. The
22 Parties agree to file any waivers necessary for the Judge to preside over any settlement
23 conference and motion practice.
24

25 **XI. IMPOSSIBILITY OF PERFORMANCE**

26 18. Where implementation of the actions set forth in this Consent Decree, becomes
27 impossible, despite the timely good faith efforts of the Parties, the Party who is unable to comply
28 shall notify the other in writing within twenty-one (21) days of the date that the failure becomes
apparent, and shall describe the reason for the non-performance. The Parties agree to meet and

1 confer in good faith concerning the non-performance and, where the Parties concur that the non-
2 performance was or is impossible, despite the timely good faith efforts of one of the Parties, new
3 performance deadlines shall be established. In the event that the Parties cannot timely agree upon
4 the terms of such a stipulation, either of the Parties shall have the right to invoke the dispute
5 resolution procedure described herein.

6 **XII. OTHER TERMS**

7
8 19. Construction. The language in all parts of this Consent Decree shall be construed
9 according to its plain and ordinary meaning, except as to those terms defined by law, in the
10 Stormwater Permit, Clean Water Act, or specifically herein.

11 20. Choice of Law. This Consent Decree shall be governed by the laws of the United
12 States, and where applicable, the laws of the State of California.

13 21. Severability. In the event that any provision, section, or sentence of this Consent
14 Decree is held by a court to be unenforceable, the validity of the enforceable provisions shall not
15 be adversely affected.

16 22. Authority. Interpretation, and Integration. The undersigned representative for each
17 Party certifies that it is fully authorized to enter into this Consent Decree and to legally bind such
18 Party and its successors in interest. All agreements, covenants, representations and warranties,
19 express or implied, oral or written, of the Parties concerning the subject matter of this Consent
20 Decree are contained herein. Paragraph and other headings are for the purpose of convenience of
21 reference only and are not intended to, nor shall they, modify or be used to interpret the
22 provisions of this Consent Decree. The Parties acknowledge that this is a negotiated agreement,
23 and that in no event shall the terms of this Consent Decree be construed against any of the Parties
24 on the basis that such Party, or its counsel, drafted this Consent Decree. This Consent Decree
25 shall apply to Amcor's operation of the stormwater facilities, management, and discharges at the
26 Facility. This Consent Decree has no bearing, and does not apply to other facilities owned or
27 operated by Amcor.
28

1 23. Effect of Settlement. Each party hereto reserves all legal and equitable remedies
2 available to enforce this Consent Decree, which the Parties intend to constitute a legally binding
3 contract.. The requirements of this Consent Decree are in addition to, and not a substitute for, the
4 terms of the Stormwater Permit, and shall be binding on Amcor irrespective of Amcor's
5 obligations pursuant to the Stormwater Permit.

6 24. Full Settlement. This Consent Decree constitutes a full and final settlement of this
7 matter. It is expressly understood and agreed that the Consent Decree has been freely and
8 voluntarily entered into by the Parties with and upon advice of counsel.

9 24. Integration Clause. This is an integrated Consent Decree. This Consent Decree is
10 intended to be a full and complete statement of the terms of the agreement between the Parties
11 and expressly supersedes any and all prior oral or written agreements covenants, representations
12 and warranties (express or implied) concerning the subject matter of this Consent Decree.

13 25. Assignment, Modification, Waiver. The provisions of this Consent Decree shall inure
14 to the benefit of and be binding upon the Parties hereto, including their officials, agents,
15 representatives, officers, directors, employees, successors, and assigns. Changes in the
16 organizational form or status of a Party shall have no effect on the binding nature of this Consent
17 Decree or its applicability. This Consent Decree may be modified only with the written consent
18 of PPC and Amcor. Any waiver of any provision of this Consent Decree by a Party must be in
19 writing and signed by a person having the authority to do so on behalf of such Party. No delay or
20 omission in the exercise of any right or remedy accruing to any Party shall impair such right or
21 be construed as a waiver of any such breach theretofore or thereafter occurring. The waiver by a
22 Party of any breach of any term, covenant or condition herein stated shall not be deemed to be a
23 waiver of any other term, covenant or condition.

24 26. Public Notices. The Parties agree that it will not issue or cause another party to issue
25 press releases, public notices and/or postings, or press articles made in relation to, or in regards
26 to, this Consent Decree and/or lawsuit. Notwithstanding the foregoing, the Parties agree that
27
28

1 Amcor may publically disclose that it has made a monetary donation in the amount of \$15,000 to
2 the San Francisco Baykeeper organization.

3 27. Notifications. Whenever any notice or any other communication is required or
4 permitted to be given under any provision of this Consent Decree shall be, to the extent feasible,
5 sent via electronic mail transmission to the e-mail addresses list below, or, if e-mail is not
6 feasible, by confirmed facsimile or certified U.S. Mail with return receipt to the addresses in this
7 paragraph. Notifications and documents required to be provided to PPC will be directed to:

8
9 Rachel S. Doughty, Esq.
10 GREENFIRE LAW
11 1202 Oregon Street
12 Berkeley, CA 94702
13 Email: rdoughty@greenfirelaw.com
14 Phone: 828.424.2005


15 Notifications required to be provided to Amcor will be directed to:

16 Ruben A. Castellon
17 CASTELLÓN & FUNDERBURK LLP
18 811 Wilshire Blvd., Suite 1025
19 Los Angeles, CA 90017
20 Email: rcastellon@candffirm.com
21 Phone: 213.623.7515

22 28. Counterparts. This Consent Decree may be executed in counterparts and by facsimile
23 or pdf signature, each of which shall be deemed an original, and all of which, when taken
24 together, shall constitute one and the same document. A facsimile or pdf signature shall be as
25 valid as the original.

26 29. Authority. The undersigned representatives for PPC and Amcor each certify that
27 he/she is fully authorized by the party whom he/she represents to enter into the terms and
28 conditions of this Consent Decree.

PLASTIC POLLUTION COALITION

By: 
Dianna Cohen, Executive Director

Date: MARCH 22, 2015

1 EARTH ISLAND INSTITUTE

2
3 By: _____
4 John Knox, Vice President and Executive Director

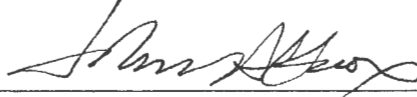
Date: _____

5
6 AMCOR RIGID PLASTICS USA, LLC, f/k/a Amcor Rigid Plastics USA, Inc.

7
8 By: 
9 Michael Schmitt, President

Date: 3/15/14

1 EARTH ISLAND INSTITUTE

2 By: 
3 John Knox, Vice President and Executive Director

Date: March 10, 2016

4
5
6 AMCOR RIGID PLASTICS USA, LLC, f/k/a Amcor Rigid Plastics USA, Inc.

7 By: _____
8 Michael Schmitt, President

Date: _____